UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
Criminal No. 10-221(DSD)

United States of America,

Plaintiff,

v.   **ORDER**

Corey N. Johnston,

Defendant.

This matter is before the court upon the pro se motion of defendant Corey N. Johnston for relief under Federal Rule of Civil Procedure 60(b)(6). Johnston makes the same arguments regarding calculation of the advisory sentencing guidelines and same complaints about his retained counsel that he made in his 28 U.S.C. § 2255 motion recently denied by this court. See ECF Nos. 46, 47, 48, 51, 53. Johnston filed a notice of appeal of that denial. ECF No. 55.

As a general rule, filing a notice of appeal divests the district court of jurisdiction over any aspect of a case involved in the appeal. Hunter v. Underwood, 362 F.3d 468, 475 (8th Cir. 2004). An exception exists, however, "to consider a Rule 60(b) motion on the merits and deny it even if an appeal is already pending" in the Eighth Circuit. Id.

A court may grant relief under Rule 60(b)(6) for "any other reason that justifies relief" when a motion is made "within a reasonable time." Fed. R. Civ. P. 60(b)(6), (c). In the present

motion, Johnston argues that his sentence is excessive, which is the essence of a § 2255 motion. Artful pleading of a § 2255 claim under Rule 60(b)(6) does not excuse Johnston from the prohibition on successive § 2255 petitions without permission of the court of appeals. See 28 U.S.C. § 2244(3); United States v. Lambros, 404 F.3d 1034, 1036 (8th Cir. 2005) (per curiam). Johnston has not received permission from the court of appeals to file the instant motion. Therefore, denial is warranted.

Accordingly, **IT IS HEREBY ORDERED** that:

1.   The motion for relief [ECF No. 63] is denied; and

2.   Pursuant to 28 U.S.C. § 2253(c), the court denies a certificate of appealability.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: August 16, 2012

s/David S. Doty
David S. Doty, Judge
United States District Court